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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 271

~~SWIFT & COMPANY~~,
NATIONAL BISCUIT COMPANY, AND
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PRAYER FOR WRIT AND NATURE OF CASE

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 12, 1958, which rejects an administrative determination of the Secretary of Agriculture on a matter which is basic to the operation of the Department's program for the support of prices paid to producers of milk and butterfat.

[1] The cases against the present petitioners were consolidated for trial with that against Swift & Company. All three cases were heard in the Court of Appeals upon a single record and that court disposed of the appeals in one opinion and judgment. Swift & Company has filed a separate petition for a writ of certiorari to review that judgment.

The Agricultural Act of 1949 authorizes and directs the Secretary of Agriculture through Commodity Credit Corporation to support the price of dairy products by "loans on, or purchases of, the products of milk and butterfat". In the course of administering the Act, the Secretary determined that certain contracts which passed title to specified dairy products to Commodity Credit Corporation for a specified consideration and which he found would tend to support the price of dairy products, were "purchases" within the meaning of the Act even though the contracts also provided for the repurchase of the goods by the seller without actual physical delivery. The Court of Appeals, while not disputing the finding of the Secretary that the transactions would tend to accomplish the objectives of the statute, held that they were not "real" purchases and were, therefore, unauthorized. Accordingly, it affirmed a judgment of the United States District Court for the District of Maryland requiring petitioners to repay without interest sums previously paid to them by Commodity Credit Corporation pursuant to such contracts.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 152 F. Supp. 738 and is printed at pp. 612-644 of the printed Record Appendix filed in the court below and filed with this Court along with this petition. The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix B, *infra*, p. 24 *et seq.*

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on June 12, 1958. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the determination of the official charged with the administration of the Agricultural Act of 1949 that certain transactions are "purchases" as authorized therein can be judicially reversed where—

(1) the transactions passed title to specified dairy products to Commodity Credit Corporation for a specified consideration; and

(2) the uncontradicted evidence in the record conclusively establishes that the transactions had the economic effect intended by the Act; and

(3) the only elements of ordinary commercial purchases which these transactions lacked bear no relation to price support or to any other objective of the Act.

STATUTES INVOLVED

The statutes involved are the Agricultural Act of 1949, 63 Stat. 1052, 7 U.S.C. 1421 *et seq*, and the Commodity Credit Corporation Charter Act, 62 Stat. 1070, 15 U.S.C. 714 *et seq*. The pertinent provisions of these statutes are printed in Appendix A, *infra*, pp. 19-23.

STATEMENT OF THE CASE

After years of study and debate and after having experimented for twenty years with various programs for giving economic aid to the farmer, Congress enacted the Agricultural Act of 1949 (Public Law No. 439, 81st Cong. 1st Sess., 63 Stat. 1052, 7 U.S.C. 1421 *et seq.*). Sec. 401 of that Act (7 U.S.C. 1421) authorizes and directs the Secretary of Agriculture through Commodity Credit Corporation to afford price support to producers of various commodities. Sec. 201 (7 U.S.C. 1446) authorizes and directs the Secretary

to support the price of "milk, butterfat and the products of such commodities" between 75% and 90% of parity by the means of "loans on, or purchases of, the products of milk and butterfat". The Secretary is directed to establish the exact level of support between the stated limits at whatever percent of parity he determines necessary "in order to assure an adequate supply".

The legislative history of the Act leaves no doubt that the purpose of limiting the Secretary's operations, insofar as dairy products are concerned, to loans and purchases was to prevent him from using direct payments or subsidies as a means of price support for these commodities. As the Court of Appeals noted (App. B, *infra*, pp. 26-27), there are two competing methods of affording price support to agricultural commodities. The so-called "purchase method" is accomplished by the publication of a standing offer by Commodity Credit Corporation to purchase all quantities of the supported commodity at a predetermined price. The effect of such an announcement is to put a floor under the market and thus to increase the farmer's income by increasing the market price of his products. Under a subsidy or direct payment method of price support, the farmer is permitted to sell his entire production at whatever price he can get for it on the market, and the difference between the price so received and the desired level of income is made up by a subsidy payment by the Government. The effect of this method is, of course, to drive the market price of the commodity down while supporting the income of the farmer by Governmental subsidies.

While the Agricultural Act of 1949 was under consideration, the then Secretary of Agriculture, Mr. Brannan, proposed what was known as the "Brannan Plan". That plan was a typical subsidy plan designed to support the income of farmers rather than the price of the commodities pro-

duced by them. It was vehemently denounced by the National Cooperative Milk Producers Federation and by leading agricultural economists. The Agricultural Act of 1949 was a complete rejection not only of the Brannan Plan but of all other proposals for aiding the farmer by subsidy programs. It was to make this explicitly clear that congress limited the authority of the Secretary in supporting the prices of dairy products to purchases of, or loans on, such products.

Aside from this limitation, the powers conferred upon the Secretary are very broad. Thus, Section 401(b) of the Act (7 U.S.C. 1421(b)) provides that the "amounts, terms and conditions of price support operations and the extent to which such operations are carried out shall be determined or approved by the Secretary" and Section 412 of the Act (7 U.S.C. 1429) provides that "determinations made by the Secretary under this Act shall be final and conclusive."[2] Section 407 of the Act (7 U.S.C. 1427) authorizes Commodity Credit Corporation to "sell any farm commodity owned or controlled by it at any price not prohibited by this section." No restrictions are placed upon the sale of milk, butterfat or the products thereof.[3]

Acting under these statutes the Secretary published a series of announcements establishing programs for the pur-

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[2] This is subject to the proviso that the scope and nature of such determination should not be inconsistent with the Commodity Credit Corporation Charter Act. The Government does not contend that the Secretary has acted in any way inconsistent with that act.

[3] The act places no restrictions upon the resale of non-storable, non-basic commodities. Section 408 (7 USC 1428) defines "non-basic agricultural commodities" to include milk, butterfat or the products thereof. This section defines a "storable commodity" as a commodity which the Secretary determines to be "storable" under the conditions set forth in the section. The Government does not deny that the Secretary determined that milk, butterfat and the products thereof are "non-storable".

chase of cheese, butter and nonfat dry milk solids and for the resale of these products in the domestic market at a fixed mark-up (2¢ per pound in the case of cheese and 3¢ per pound in the case of butter) above the support purchase price in effect at the time of resale. For the 1953-1954 marketing year (April 1, 1953 — March 31, 1954) the level of price support was established by the Secretary at 90 per cent of parity, resulting in a support purchase price of 65½ cents per pound of butter and 37 cents per pound of cheese. Because of the tremendous surplus stocks acquired by CCC during the 1953-1954 marketing year the Secretary reduced the support level for the ensuing marketing year (beginning on April 1, 1954) to 75 per cent of parity — an action which had the effect of creating an abrupt drop in CCC purchase prices of 8 cents per pound in the case of butter and 4¾ cents per pound in the case of cheese.

As a result of this unprecedented situation, the Department of Agriculture was faced with a number of problems. Prices paid to producers during March 1954 threatened to fall to 75 per cent of parity. Moreover, holders of inventories of cheese and butter had a strong incentive to sell a large part of their holdings to CCC before the price reduction on April 1 and thereafter repurchase what they needed in the open market at lower prices. In fact, it was anticipated that the knowledgeable element of the trade would offer to CCC every pound of cheese and butter that could possibly be spared (even to the extent of selling certain cheeses which had to be repackaged) thus reducing normal flow into the pipelines of distribution and creating a staggering disposal problem for CCC. If for any reason such holders of cheese or butter did not wish to part with their stocks, they could, under long-standing policies and procedures, have repurchased the *identical* goods from CCC in April at a lower price prior to the time that they were

required to make delivery of the goods to CCC under the original sale in March. However, it was realized that certain holders of cheese and butter would not be able to take advantage of this means of minimizing their inventory losses because of ignorance, lack of experienced personnel, lack of credit or the specialized character of their holdings.

In an effort to cope with these anticipated developments, the Department in press releases and announcements issued at various times during March 1954 modified its purchasing procedures "so as to provide more effective price support for dairy farmers manufacturing milk prices during March and to permit orderly commercial distribution of butter, Cheddar cheese and nonfat dry milk solids during the next six weeks". Among these modifications was the decision of the Secretary of Agriculture to permit sellers offering cheese and butter during March to contract immediately to repurchase such offerings during April at the customary margins of two and three cents, respectively, above the April sales price. This decision was implemented by announcement "Da-112" which outlined a procedure for those desiring to enter into such purchase-and-resale agreements and set forth the terms and conditions of the sale and repurchase. (This Announcement is printed in full at pp. 520-530 of the Record Appendix in the Court of Appeals).

Under the procedure thus established, holders of cheese and butter were invited to submit offers to sell to and repurchase from CCC their holdings "subject to the terms of Announcement Da-112". The offers had to be submitted in time for acceptance prior to the close of business on March 31, 1954 and had to state the quantity of the commodity being offered, its grade, the number and description of its containers and the location where it was to be held for

CCC. If the offer was in proper form CCC accepted it subject to inspection by Government graders if the lots offered had not previously been graded by the Government. The contracts further provided that title to the commodity was to pass to CCC "at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later." Title was retransferred to the offerer on April 1 or, if the commodity was inspected after April 1, immediately after inspection, whichever was the later.

Petitioners, relying on the Department's published announcement and because of the representations there made, sold and repurchased certain portions of their inventories of cheese and butter under the Da-112 procedure. They complied fully and in detail with all the requirements of that announcement; they selected cheese and butter which met the Department's specifications; they dated these in accordance with approved practice; they segregated these from remaining inventories and presented them for inspection and grading by the representatives of the Department; and they then held them in storage for CCC during the remainder of the marketing year, *i.e.*, until April 1, 1954 or until inspection and acceptance by the Government, whichever was the later (Stipulation, Record Appendix in Court of Appeals, p. 595 *et seq.*). Having thus complied with all the provisions of the contract of purchase and resale, they ultimately received payment from the Government for the difference between the purchase price which the Department had agreed to pay for all cheese and butter offered to CCC before April 1, 1954 and the price at which CCC had agreed to resell all of its stocks of cheese and butter on and after that date.

Some two years after the Da-112 transactions were fully consummated, the Department of Justice demanded repay-

ment of the sums in question after the Department of Agriculture had refused to make such a demand on the ground that the transactions were fully authorized. Upon the petitioners' refusal to make repayment, the Department of Justice brought the present suits in the District Court to enforce its claim for repayment.

At the trial below, petitioners produced officials of the Department of Agriculture, representatives of the industry and two distinguished agricultural economists who testified as to the economic effect of transactions under Da-112. Their testimony as summarized by the Court of Appeals (App. B, *infra*, p. 35) showed that these transactions "(1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March; (2) tended to assure the effectiveness of support activities during the ensuring year and to minimize the expense thereof; (3) promoted the orderly distribution of dairy products and the commercial consumption thereof; (4) saved the Government money and prevented useless expenditures by the butter and cheese industry." The Government produced no testimony to the contrary. In fact, the only witness produced by the Government, Harlan J. Emery, agreed with the economic judgment of the petitioners' expert witnesses (Record Appendix in Court of Appeals, pp. 50, 57-68, 71-76, 79-80, 84, 91-97).

The Court of Appeals, while not disputing the uncontradicted testimony of the witnesses as to the economic effect of these transactions, held that the Secretary had exceeded his powers under the statute by determining that the Da-112 transactions were "purchases" within the meaning of the Agricultural Act of 1949 and resales expressly permitted thereby. This conclusion was reached "irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products or the maintenance

of the processors' inventories" (App. B, *infra*, p. 36). Petitioners' contention that the Secretary might reasonably have concluded that these transactions were purchases within the meaning of the statute "because on their face they purported to be purchases involving the transfer of title to specific commodities at a specified time, for a specified consideration and also because the economic effect of the transactions in keeping up the level of prices was the same as any ordinary purchase of products" was rejected on the ground that Congress intended to limit the Secretary to "genuine" purchases and sales whereas these transactions were not purchases by CCC "in any normal sense of the word". The Court found that regardless of their form and economic effect, the transactions under Da-112 "did not constitute purchases in any realistic sense" and were, therefore, not authorized by the statute (App. B, *infra*, pp. 35-36).

REASONS FOR GRANTING THE WRIT

First: This case presents a novel question of wide significance. The proper construction of the Agricultural Act of 1949 is important not only to producers of milk and butterfat throughout the nation but to the entire dairy products industry. In the course of his testimony in this case, Professor John D. Black of Harvard University[4] said:

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[4] Professor Black has been Professor of Economics at Harvard University since 1927, and is presently engaged in advising private industry and the Department of Agriculture as a consulting economist. He is past president of both the American Economics Association and the American Farm Economic Association. He has been consulted by the Government on all major agricultural legislation since 1922 and has testified before Congressional committees on numerous agricultural bills (including the Agricultural Act of 1949). He has served on a great number of boards and committees for the Government, including the following: Chief Economist, Federal Farm Board, 1931-32; Consulting Specialist, Bureau of Agricultural Economics, U. S. Department of Agriculture, 1922; Chairman of the Advisory

"If the court rules that Da-112 is not covered by the law, then Congress needs to amend the Act so that such operations are covered. It is not easy to exaggerate the importance of this. In saying this, I am speaking as an economist who has been giving special attention to marketing of farm and food products, and to the consumption side of this, and most attention of all to the dairy products" (Record Appendix in Court of Appeals, p. 306).

Second: The three petitioners were by no means alone in their participation in the Da-112 transactions. Over 130 different concerns, representing each segment of the dairy industry from farmers' cooperatives to retail users of dairy products, entered into Da-112 transactions covering 86,000,000 pounds of cheese and 5,000,000 pounds of butter, and involving net expenditures by the Government of nearly $2,400,000 (Stipulation, Record Appendix in Court of Appeals, pp. 596-597). In all of these cases, demand has been made by the Government for return of payments made pursuant to these contracts and litigation is either pending or in prospect. A definitive ruling by this Court is needed to avoid the necessity for further litigation and to furnish guidance to the lower courts before whom such suits may now or hereafter be pending.

Third: The administration of the Agricultural Act of 1949 involves questions which are primarily economic. For this reason Congress gave broad powers to the Secretary of Agriculture to determine "the terms and conditions of price support operations", and provided that his determina-

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Committee on Agriculture, Social Science Research Council, 1930-33; Member of Agricultural Research Policy Committee and Mobilization Board, U. S. Department of Agriculture, 1949-53; Consulting Economist War Food Administration, 1953; Consulting Economist to the TVA 1940 to present; Consulting Economist, Foreign Operations Administration, 1954-55; Member of the Advisory Committee on Economics and Marketing, FAO.

tions should be "final and conclusive." We submit that it was for the Secretary and not for the Court of Appeals to decide whether the purchases made by CCC under Da-112 were "genuine" or "realistic". In rejecting the Secretary's determination that they were so, the Court of Appeals has invaded his province. This unwarranted intrusion into the domain of a cabinet officer in a matter affecting the national economy requires the attention and corrective action of this Court. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110; *United States v. Ruzicka*, 329 U.S. 287; see also: *National Labor Rel. Bd. v. Hearst Publications*, 322 U.S. 111; *Gray v. Powell*, 314 U.S. 402; *Federal Trade Commission v. Sewell*, 353 U.S. 969.

Fourth: The Department of Agriculture has consistently maintained *and still does maintain* that the transactions under Da-112 were authorized by the Agricultural Act of 1949 and that they were "purchases" within the meaning of Section 201 of that Act. The Court of Appeals does not appear to have understood this in spite of the clear testimony to that effect of the officials of the Department of Agriculture who appeared at the trial below. The extent of the Court's confusion appears from its reference (App. B. *infra*, p. 37) to certain opinions of the Solicitor of the Department of Agriculture, later concurred in by the Attorney General, holding that the Act did not authorize certain proposed transactions of purchase and resale which admittedly would not have supported the price of the products involved, but would simply have operated as a subsidy to the producer. The Court appears to have overlooked the concession made by counsel for the Government in the trial court that these rulings of the Solicitor of the Department dealt with situations which were quite different from that presented by the present record (Record Appendix in Court of Appeals, pp. 117-118).

The Court of Appeals seems also to have been misled by the partial quotation of testimony given by an official of the Department of Agriculture before a committee of Congress which was investigating the Da-112 transactions. This official accepted full responsibility for the Da-112 transactions and defended them vigorously. His testimony, taken as a whole, shows that he did not regard them as mere "paper transactions" as the Court of Appeals seems to have thought (App. B, *infra*, p. 37) but considered them to be purchases and resales within the meaning of the Act (Record Appendix in Court of Appeals, pp. 409, 414; and see pp. 376, 380-381, 387-389, 392, 397, 403, 414-416, 423, 425-426, 428-429, 431).

The Court's misconstruction of prior administrative interpretations of the statute is bound to create serious confusion and to hamper the Secretary in the future administration of the Act. As the matter now stands, the Secretary must limit his operations under the statute to those purchases which the courts will call "normal", or else proceed at the risk of having his programs struck down and those members of the industry who have cooperated in making them effective subjected to the burden of refund suits.

Fifth: In addition to being a departure from the general principles of administrative law announced by this Court, the decision of the Court of Appeals is in direct conflict with *National Labor Rel. Bd. v. Hearst Publications*, 322 U. S. 111 (1944). There the Board held news boys to be "employees" within the meaning of the National Labor Relations Act, even though it admitted that by standards normally applied to other legal situations news boys were independent contractors. After analyzing the legislative history of the Act and the economic objectives which Congress was seeking to attain, this Court upheld the Board, saying (at pp. 128, 130):

"In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise *with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.*

* * * * * *

"*** Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. ed. 796, 53 S. Ct. 350; United States v. American Trucking Assoc., 310 U. S. 534, 84 L. ed. 1345, 60 S. Ct. 1059. *But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.* Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. ed. 732, 60 S. Ct. 544) or that he was injured 'in the course of employment' (Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. ed. 184, 62 S. Ct. 221) and the Federal Communications Commission's determination that one company is under the 'control' of another (Rochester Teleph. Corp. v. United States, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754), *the Board's determination that specific persons are 'employees' under this Act is to be accepted if it has 'warrant in the record and a reasonable basis in law.'* (Italics supplied.)

We submit that in rejecting the Secretary's economic determination of what constitutes "purchases" within the meaning of the price support statute and in adopting a "normal" meaning which bears no relation to the objectives

of the Act, the Court of Appeals set itself in direct conflict with the *Hearst* case. And the attempt of the Court of Appeals to distinguish the two cases (App. B, *infra*, p. 38) only serves to emphasize this conflict.

Sixth: The decision below clearly misconstrues the statute. The word "purchases" as used in the Agricultural Act of 1949 has a special meaning derived from legislative history and administrative practice. That meaning has been defined by testimony before Congressional committees, by reports of such committees on the Act and its predecessors, by debates on the floor of Congress and by reports made to Congress from time to time by the Secretary of Agriculture. From consideration of all these sources it is apparent that Congress using the word "purchases" intended to authorize transactions of simultaneous sale and resale provided that such transactions tended to support the price of the commodities involved. By disregarding this background, the Court of Appeals has been lead into a misconstruction of the statute which has deprived the Secretary of Agriculture of powers needed to carry out the objectives of Congress.

The basic error of the Court of Appeals is its assumption that in prescribing "loans and purchases" as the method of affording price support to dairy farmers, Congress intended to limit the Secretary to purchases in the "normal sense of the word." Nothing could be further from the fact. The purpose of an ordinary commercial purchase is to acquire the right to resell the product at a profit or physically use it in the course of the buyer's business. In such a transaction transfer of possession and freedom of use after purchase is essential. A price support purchase, on the other hand, has as its *raison d'etre* the economic effect which it tends to produce in the market for the purchased

commodity and not the use made of the product after purchase.

In view of its misunderstanding as to the purpose and function of price support purchases, it is not surprising that the Court of Appeals should be misled by the fact that CCC did not acquire physical possession of the commodities during the time that it had title. But in purchasing commodities under the programs established under the Act, CCC is acquiring goods for which it has no use and of which generally speaking it can dispose only by giving them away. It is not interested in getting physical possession or dominion over the goods but only in seeing that they are removed from market competition for a limited period during which prices are to be supported at a specified level. So long as this is accomplished CCC is glad to (and under normal procedures does frequently) leave the goods in the custody of the seller and stands ready to sell the goods to any one, including the original seller, who will pay the established margin above the support price (Record Appendix in Court of Appeals, Emery, pp. 33-34).

It is, therefore, of no moment that the goods "never left the possession of the processors or came into the hands of the United States and were never intended to do so." Since the offerer was committed to repurchase the identical goods it is not of the slightest significance that "storage, handling and transportation charges connected with the sale or resale were 'for the account of the offerer' (processor), and the offerer assumed all risk of loss." Since the offerer was committed to repurchase goods at the identical price which the Government had offered to sell to any other purchaser, it was entirely academic that the Government "obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor."

The only real difference between Da-112 transactions and other admittedly valid purchases of dairy products under the Agricultural Act of 1949 is that under Da-112 the seller was required to agree in advance to repurchase and the Government in turn agreed to resell the identical goods at the established CCC selling price. The fact that this price was below what CCC agreed to pay for the goods was simply the consequence of the reduction in the level of price support for the ensuing year. This reduction was required by law as the Government concedes.

The Government argued below that this loss could have been avoided by the refusal of CCC to sell the goods below cost, but as the officials of the Department of Agriculture made clear in their testimony, this would have disrupted the entire program for the disposal of products held by CCC and would in the end have cost the Government a great deal more than the losses which resulted from the Da-112 transactions. For this reason, as the Court of Appeals concedes (App. B, *infra*, pp. 38, 39), "the program saved money not only for the processor but also for the Government."

CONCLUSION

By interpreting the word "purchase" in its so-called "normal" meaning, the Court of Appeals has construed the statute without regard to its purpose. This runs counter to the general principle that words in a statute having broad economic objectives must be construed in the light of those objectives rather than according to "technical classifications." *National Labor Relations Board v. Hearst Publications*, 320 U. S. 111 (1944). The determination of the Secretary of Agriculture that the economic character of transactions under Da-112 made them purchases with respect to the ends sought to be accomplished by the Agri-

cultural Act of 1949, was consonant with the legislative purpose and should have been accepted.

This is not to argue that the Secretary may engage in any operation which supports prices. In the present case the transactions involved the passage of legal title to specified goods for a specified consideration at a specified time. It is only by disregarding these legal formalities that the Court of Appeals was able to conclude that these transactions were not purchases. But if legal formalities are to be disregarded then we submit that the economic realities should control and that they are for the Secretary of Agriculture to determine rather than for the courts.

It is for these reasons that we urge that this petition should be granted.

Respectfully submitted,

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APPENDIX A

AGRICULTURAL ACT OF 1949

The pertinent parts of the Agricultural Act of 1949 (63 Stat. 1052; 7 U.S.C. 1421 *et seq.*) are as follows:

Sec. 1421 (Sec. 401 of Act). *Source of Price Support; Authority of Secretary; Factors Considered; Compliance by Producer; Time of Determining Levels.*

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. . . .

* * * * * *

Sec. 1426 (Sec. 406 of Act). *Advance Announcement of Price Support Levels; Variation of Levels.*

The Secretary shall, insofar as practicable, announce the level of price support for . . . agricultural commodities in advance of the beginning of the marketing year . . . the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

Sec. 1427 (Sec. 407 of Act). *Sale of Farm Commodities; Policies and Rates of Sale; Exceptions.*

The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. [The section then sets forth certain restrictions on the sale of "basic" and "storable nonbasic" agricultural commodities] . . . .

Sec. 1428 (Sec. 408 of Act). *Definitions.*

For the purposes of this Act—

(a) A commodity shall be considered storable upon determination by the Secretary that, in normal trade practice, it is stored for substantial periods of time and that it can be stored under the price-support program without excessive loss through deterioration or spoilage or without excessive cost for storage for such periods as will permit its disposition without substantial impairment of the effectiveness of the price-support program.

* * * * * *

(c) A "basic agricultural commodity" shall mean corn, cotton, peanuts, rice, tobacco, and wheat, respectively.

(d) A "nonbasic agricultural commodity" shall mean any agricultural commodity other than a basic agricultural commodity.

Sec. 1429 (Sec. 412 of Act). *Determinations of Secretary as Final and Conclusive.*

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

* * * * * *

Sec. 1446 (Sec. 201 of Act). *Price Support Levels for Designated Nonbasic Agricultural Commodities.*

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447-1449 of this title) price support to producers for wool (including mohair), tung nuts, honey, Irish potatoes, *milk, butterfat, and the products of milk and butterfat* as follows:

* * * * * *

(c) *The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at*

such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefore as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat. (Italics supplied.)

COMMODITY CREDIT CORPORATION CHARTER ACT

The pertinent parts of the CCC Charter Act (62 Stat. 1070, 15 U.S.C. 714 *et seq.*) are as follows:

Sec. 714 (Sec. 2 of Act). *Creation and Purpose of Corporation.*

For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibres (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general direction and control of its Board of Directors.

* * * * * *

Sec. 714b (Sec. 4 of Act). *General Powers of Corporation.*
The Corporation—

* * * * * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business. . . .

(j) Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

(l) May make such loans and advances of its funds as are necessary in the conduct of its business.

* * * * * * *

Sec. 714c (Sec. 5 of Act). *Specific Powers of Corporation.*

In the fulfillment of its purposes and in carrying out its annual budget programs submitted to and approved by the Congress pursuant to the Government Corporation Control Act, the Corporation is authorized to use it general powers only to—

(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations.

(b) Make available materials and facilities required in connection with the production and marketing of agricultural commodities.

(c) Procure agricultural commodities for sale to other Government agencies, foreign governments, and domestic, foreign, or international relief or rehabilitation agencies, and to meet domestic requirements.

(d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities.

(e) Increase the domestic consumption of agricultural commodities by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities.

(f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities.

* * * * * *

Sec. 714g (Sec. 9 of Act). *Board of Directors; Composition; Appointment, Tenure, and Compensation; Interim Board.*

The management of the Corporation shall be vested in a Board of Directors (hereinafter referred to as the "Board"). The Board shall consist of five members. The Secretary of Agricultural, or his nominee, shall be a member of the Board and the remaining members shall be appointed by the President by and with the advice and consent of the Senate. . . .

* * * * * *

Sec. 714h (Sec. 10 of Act). *Executive Staff; Composition; Duties; Appointments.*

Responsibility for the day-to-day conduct of the business of the Corporation shall be vested in a staff of executive officers headed by a chief executive appointed by the Board and responsible to the Board.

* * * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7579.

Swift & Company,
National Biscuit Company, and
The Great Atlantic & Pacific Tea Company,
Appellants and
Cross-Appellees,

Versus

United States of America,
Appellee and
Cross-Appellant.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Reargued April 25, 1958. Decided June 12, 1958)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

David R. Owen (Semmes, Bowen & Semmes on brief) for Appellant and Cross-Appellee, Swift & Company; William L. Marbury and John Martin Jones, Jr., (William E. MacKay, Walter S. Halliday, Jr., and Fred E. Campbell on brief) for National Biscuit Company and The Great Atlantic & Pacific Tea Company, Appellants

and Cross-Appellees; George Cochran Doub, Assistant Attorney General, and Marvin C. Taylor, Special Litigation Counsel, Department of Justice, (Leon H. A. Pierson, United States Attorney, on brief) for United States of America, Appellee and Cross-Appellant; and M. R. Garstang on brief for the National Milk Producers Federation, as *amicus curiae*.

SOPER, Circuit Judge:

The United States in these suits seeks to recover substantial sums of money paid by the Department of Agriculture, acting through the Commodity Credit Corporation, to Swift & Company, National Biscuit Company and The Great Atlantic and Pacific Tea Company under a program for price support of milk, butterfats and the products of such commodities in March and April, 1954. In all, payments amounting to approximately $2 million were made to 132 corporations. The payments were made and accepted in good faith in the belief of the parties that the Secretary was acting in accordance with the Agricultural Act of October 31, 1949, 63 Stat. 1051, 7 U.S.C. §1421 et seq., and particularly with §201, 7 U.S.C. §1446(c), which establishes price support levels for dairy products in the following terms:

> "(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat."

The crucial question is whether the transactions involved constituted purchases of the products of milk and butterfat. The Secretary concluded that the transactions were purchases within the meaning of the statute, but subsequently they were examined by the Fountain Committee, a sub-

Committee of the House Committee on Government Operations, 84th Congress, 2nd Session, and an opinion was sought from the Comptroller of the United States. He ruled that the transactions were not purchases and that the payments were unauthorized and improper. Accordingly the present suits were instituted. The District Judge reached the same conclusion and entered judgments for the United States against Swift & Company in the sum of $28,373.84; against National Biscuit Company for $108,693.78; and against The Great Atlantic and Pacific Tea Company for $109,572.55. The defendants have appealed from these judgments. The District Judge refused to add interest to the amounts which he found to be owing by the defendants and the United States has filed a cross-appeal from this ruling.

The transactions took place in March and April, 1954, but they will be better understood from a consideration of the following outline of prior transactions, undertaken by the Secretary of Agriculture to carry out the provisions of the Act, which were designed to afford price support to the producers of various agricultural commodities including milk and butterfat and the products thereof. During the course of the years two distinctive methods for increasing the income of dairy farmers have been evolved. One of these programs is designed to increase the market price of the supported commodity by limiting the supply. Under this method the Government makes a standing offer to purchase, and actually purchases, all quantities of the commodity offered at a pre-determined support price, and thereby so much of the supply as cannot be sold at the desired price level will be removed from the open market and the price level well be maintained.

The other method lets the market price fall through the sale of an unrestricted supply of farming commodities but assures a reasonable return to the farmer by giving him a direct subsidy payment. The amount of the payment is determined by calculating the difference between the free market price he receives for his products and the price the Department of Agriculture determines he should receive

so as to enable him to earn a profit. The basic economic difference between the two programs is that the former is designed to keep the market price up to the desired level through Government acquisition, while the latter lets the market seek its own level and supplements the farmer's income by direct payments.

Both of these methods have been tried under the authority of acts of Congress. The Agricultural Adjustment Act of 1938, 52 Stat. 31, 43, provided limited guarantees of prices ranging from 52 to 75 per cent of parity with those prevailing in the base period between 1910 and 1914. The Commodity Credit Corporation was the agency through which financial assistance was extended. The Steagall Amendment to the statute, passed in 1941, authorized the Secretary of Agriculture to support the price of nonbasic agricultural commodities such as milk at 85 per cent and later at 90 per cent of parity "through a commodity loan, purchase or other operation"; and a program was set up which provided for the purchase by CCC of cheese at one price without physical delivery and the immediate resale at a lower price. During the Second World War both direct payment and sale-and-resale at a loss programs were used in aid of the farming industry. The effect of these programs was to furnish an abnormally low market price to consumers; but when the programs were first restricted and finally abolished by Congress near the end of the war and prices consequently rose, resentment against the farmers was aroused and substantial harm to the market for dairy products ensued. It was under these circumstances that Congress passed the Agricultural Act of 1948 (62 Stat. 1247). It provided in Title I a temporary program under which the Secretary was directed to support the price of agricultural commodities, including the dairy products, by means of "loans, purchases and other operations." This was to continue until December 31, 1949, when a permanent farm program, set up by Title II, was to become effective. Therein price support was authorized by "loans, purchases, payments and other operations."

In the meantime, Secretary of Agriculture Brannon, who was then in office, proposed a plan which involved the maintenance of farm income by direct payment to farmers and permitted the sale of farm products in a free market. Congressional hearings were held on this subject during which the Secretary stated that Title II of the Act of 1948 was, in his opinion, broad enough to permit direct payment to farmers. So much opposition developed to the plan, however, that it was speedily abandoned and Congress repealed Title II of the Act of 1948 and passed the Agricultural Act of 1949.

General provisions contained in subchapter I of this statute define the power and authority of the Secretary of Agriculture in providing the price support authorized or required by the Act. The Secretary is directed by §401 of the Act, 7 U.S.C. § 1421, to provide the price support through CCC. Section 407, 7 U.S.C. §1427, provides that the corporation may sell any farm commodity at any price not prohibited by the section. Basic agricultural commodities and storable nonbasic commodities may not be sold at less than 5 per cent above the current support price; but no restrictions as to price are placed upon nonstorable or nonbasic commodities such as milk, butterfat and the products thereof. Section 406, 7 U.S.C. §1426, directs the Secretary, in so far as is practicable, to announce the level of price support for agricultural commodities other than field crops, in advance of the beginning of the marketing year or season, and the level of price supports so announced cannot be reduced during the year. Section 412, 7 U.S.C. § 1429, provides that determinations made by the Secretary under the statute are final and conclusive provided that they are not inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

The specific provision for the support of the prices of milk, butterfat and the products of these commodities is set out in §201, 7 U.S.C. §1446(c), set out above, which provides that the price level shall not be in excess of 90 per centum or less than 75 per centum of the parity price

and that price support shall be provided through "loans on or purchase of" the products of milk and butterfat.

Under this statute a series of annual diary price support programs, each to take effect on April 1st for the period of one year, were formulated and announced. The program for the year 1953-54 may be taken as typical, since it was similar in all essentials to those which prevailed in prior years. The Secretary announced on February 27, 1953, that milk and butterfat would be supported at 90 per centum of parity for the marketing year beginning April 1, 1953, and the announcement was followed by the publication, on March 12, 1953, of the 1953-54 price support document which outlined the basic policies to be followed by CCC in the ensuing marketing year. It was announced that butter, cheese and nonfat dry milk solids would be purchased as products of milk and butterfat in carload lots, and that with respect to cheese the style that would be purchased was limited to Grade A Cheddar of large size; and that during the year CCC would purchase, at prices fixed in the document, all quantities of dairy products without regard to the identity of the seller or the source, age or market value of the cheese. The purchase price of cheddar was fixed at 37 cents per pound and the purchase price of butter at 65¾ cents per pound, which were estimated to produce prices for the dairy products representing 90 per centum of parity. Dairy products acquired were to be sold at such prices above the purchase price as the President might approve which would not discourage manufacturers, processors or dealers from carrying normal inventories. Subsequent press releases established a resale price at a standard mark-up of 2 cents per pound for cheese and 3 cents per pound for butter above the support purchase price in effect at the time of the resale. These markups were identical with those previously establised in prior years.

Detailed procedures for carrying out the policies were also covered by announcements, which included Da-99 and Da-100 pertaining to the sale of butter and cheese to CCC, respectively, and Da-107 pertaining to the resale

of these commodities by CCC. Da-100 was a standing offer by CCC to purchase at 37 cents a pound all the cheese offered which met the specifications and provisions were made for the inspection and grading of the product. Offers were subject to acceptance within two days and after acceptance delivery instructions were to be made within seven days, after which an additional seven days were allowed to seller for delivery. Da-99 contains similar provisions in regard to the purchase of butter. Da-107 contained the instructions for the purchase from CCC of specific lots of dairy products at the sale price in effect at the time. In the case of cheese, the product was sold on the basis of the grading certificate covering it when it was purchased and the purchaser was required after acceptance of his offer to furnish a certified check within two days, and delivery to the purchaser at the Government warehouse was to be made within two days after payment. Title to the product was to pass to the purchaser when the product was removed from the warehouse or at the end of six business days after the notice to deliver, whichever first happened. The evidence showed that any person who sold cheese to CCC could subsequently repurchase the same cheese if it was then still available. The products were stored at Government expense until they could be given away or resold, usually at a loss.

The price support program for the year 1953-54 resulted in an increased production of milk and large quantities of butter, cheddar cheese and nonfat dry milk solids so that great quantities of these articles were accumulated notwithstanding every effort to dispose of them. Accordingly, on February 15, 1954, the Secretary announced that for the ensuing marketing year the prices of milk and butterfat would be fixed at 75 per cent of parity, and on February 18 that the support price for butter would be 57½ cents per pound and for cheese 32¼ cents per pound during the marketing year April 1, 1954 to March 31, 1955.

The production of milk and butterfat during the 1953-54 year was well known and the announcement of the

Secretary had been anticipated. The results of the change of policy were important. Prices paid to the farmers dropped suddenly and producers of cheese shifted from small-styles into large-styles which could be sold to CCC under the program of the current marketing year. Cheese, however, could not be sold to CCC until it was ten days old and had been graded. Consequently the prices that would be paid by the manufacturers to the farmers after March 15, would naturally seek the level of the prices which would take effect after April 1. Moreover, it was to the interest of all holders of cheese and butter to sell their holdings to CCC prior to April 1, with the prospect of replenishing their stocks on the open market under the lower price levels that would prevail after April 1. It was even possible for the producers to arrange to repurchase identical lots after April 1.

Some difficulty stood in the way of those who desired to follow this course of conduct in the latter part of February. The requirements for grading cheese prior to purchase by CCC could not be met under the established practice before the end of March, but if the inspection requirements were relaxed it would be possible for a processor to sell his cheese to CCC at 37 cents a pound up until the end of March and later to repurchase the same or similar cheese on or after April 1st at the announced selling price of 34¼ cents a pound for the year 1954-55. Similar arrangements would be made for the sale and repurchase of butter. These transactions required the processors to furnish certified checks so that their money was tied up for considerable periods, and in the case of cheese the further expenditure of 1½ cents a pound for packaging was involved. Notwithstanding these drawbacks, it was to the interest of the manufacturers to sell their product at the March price and repurchase it at the April price. If they did so, the Government surplus would be largely increased and the adequacy of the processors' inventories to meet the demand of the public would be jeopardized.

These circumstances led the Secretary to adopt a special program applicable to March and April 1954, which gave

rise to the transactions that are attacked in these suits. The Secretary issued a press release on March 4, 1954 which was followed on March 9, 1954, by announcement Da-112. Thereby the Secretary gave notice that for the remainder of the month of March CCC was prepared to purchase butter, cheese and nonfat dry milk solids under the 1953-54 program and to resell these commodities to the offerers at CCC domestic sales prices in effect during April. The offer to sell and repurchase was required to be submitted and accepted prior to the close of business on March 31. In each instance the transaction included an agreement on the part of the producer to repurchase the commodity in the case of butter on April 1, and in the case of cheese on April 1 or on the date of inspection, whichever was later.

The effect of such a transaction was, in the case of cheese, that the processor would sell its cheese to CCC at 37 cents per pound, the purchase price which had been fixed under the 1953-54 program, and would immediately repurchase the same for 34¼ cents per pound, the sales price fixed by the Secretary for the 1954-55 program. Certain procedures were outlined in announcement Da-112 in order to make these transactions feasible. The requirement as to inspection and grading of the cheese was relaxed so that it could be accomplished not later than April 30, after the offer to sell had been accepted instead of before acceptance as was the standard practice. Similarly the requirements for packaging and marketing the products in the case of cheese were relaxed.

Provisions relating to the delivery of the commodities and the passage of title were contained in the following provisions:

"9. Delivery:

"*Butter*: Butter offered under the terms of this announcement must have been graded before offered and must have been graded not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded, and at

the time the offer is accepted subject to quality requirements set forth herein as later evidenced by certificates issued by USDA.

"*Cheese*: Cheese offered under this announcement must be in existence, dated, and owned or under consignment to offerer not later than March 31, 1954. Delivery to CCC and transfer of title shall be effected at the location at which it is graded and at the time it is graded or when offer is accepted, whichever is later, subject to its meeting the quality requirements set forth herein, as later evidenced by certificates issued by USDA which may be dated after March 31, but not later than April 30, 1954.

* * * * * *

"The offerer, at his expense, shall hold for CCC at the location at which it is graded or sampled in case of milk, and delivered, the commodity which he has delivered to CCC from the time of delivery until CCC redelivers the commodity to the offerer. Failure of the offerer to hold the commodity for CCC until its redelivery to the offerer shall render the contract void."

Under these provisions there was no transfer of the custody of the products, which remained in the possession of the processors.

Certain provisions or options were given to the processors in order to encourage them to enter into the transaction of sale and repurchase. It was provided that if the CCC sale price in effect in April should be greater than the March 31 support purchase price, CCC would, at the offerer's request, relieve the seller of his liability to repurchase and to provide for its sale to CCC under announcements Da-99 and 100, which were standard in the 1953-54 year. The second option provided that under the same circumstances CCC would, at the offerer's request, render the contract void. These provisions were inserted to protect the processor in the event of the passage

of certain bills pending in Congress which would have required the Secretary to establish the price level of farm products at 100 per cent of parity.

In practical effect, the offerer also had the option to cancel the contract to sell the goods to CCC and to sell them elsewhere. Paragraph 9, quoted above, provides that failure of the offerer to hold the commodities for CCC until redelivery renders the contract void. The apparent breach of contract in such a case did not form the basis for any substantial cause of action against the offerer because it would occasion no damage to CCC but would actually result in a saving of money.

The transactions were further faciliated by the provision that settlement for the commodities purchased and resold should be merely on the basis of vouchers submitted by the offerer claiming the net difference between the sales price and repurchase price. The payment of this difference by CCC was the only money that passed hands in the course of the transactions.

On March 23, 1954, the dairy price support program was modified by making it applicable to so-called small-style cheeses. These had been excluded from the standard program and also from the program of Da-112, and in view of unfavorable conditions the manufacture of these styles had practically stopped. This was an unfortunate development since these cheeses were the most readily salable so they were included by the amendment in Da-112 and also in the program for the year 1954-55.

The practical effect of the program was that 132 contracts were entered into under Da-112 for the sale of 5 million pounds of butter and 86 million pounds of cheese and all of the contracts for the purchase of butter and all except six of the contracts for the purchase of cheese involving 252,683 pounds, were actually performed and payments were made by the Government. The economic effect of these transactions was described in the testimony of officials of the Department of Agriculture and of expert

witnesses who testified on behalf of the defendants. In their opinion the transactions (1) helped to support the price paid to dairy farmers for milk and butterfat during the month of March; (2) tended to assure the effectiveness of support activities during the ensuing year and to minimize the expense thereof; (3) promoted the orderly distribution of dairy products and the commercial consumption thereof; (4) saved the Government money and prevented useless expenditures by the butter and cheese industry.

The area of controversy is centered upon the meaning to be given to the direction of Congress that the Secretary, in performing the duty to support the price level of the products of milk and butterfat, must confine himself to loans on or purchase of the products. The controversy is narrowed in this instance to the meaning of the word "purchases", since loans were not attempted. In general terms, the position of the Government is that the word is to be given its normal meaning because there is nothing in the Act to indicate that a special meaning was intended and, more particularly, because the legislative history shows beyond dispute that Congress intended to forbid the Secretary to support the predetermined price level by direct payments or subsidies or "any other operations" than loans or purchases. Since the transactions undertaken by the Secretary under Da-112 did not constitute purchases in any realistic sense, they were not authorized by the statute and the payments made to the defendants must be returned. In addition, it is contended, for a number of reasons, that the transactions under Da-112 did not tend to effectuate the purpose of the statute to support the prices of dairy products in order to assure an adequate supply.

The defendants take a broader view of the meaning of the Act. They say that Congress omitted from the Act provisions empowering the Secretary to make "payments" or to engage "in other operations" to support prices, only to prohibit such operations as might tend to lower the market prices paid for the products, and that "there is nothing whatsoever to indicate that Congress intended to

prohibit any transactions which would support the price of cheese and butter." Hence the transactions under Da-112 were in conformity with the law, because on their face they purported to be purchases involving the transfer of title to specific commodities at a specified time for a specified consideration, and also because the economic effect of the transactions in keeping up the level of prices was the same as any ordinary purchase of products. In any event, it is said that the matter is not open to question in the courts since the Secretary properly determined that the transactions were purchases which would accomplish the purposes of the statute, and his determinations are made final and conclusive by § 412 of the statute, 7 U.S.C. § 1429.

It is our view that the Government's position is correct and we reach this conclusion irrespective of the effect that the Da-112 transactions may have had upon the price level of dairy products or the maintenance of the processors' inventories. The so-called sales of cheese and butter by the processors were not purchases by CCC in any normal sense of the word. The products never left the possession of the processors or came into the hands of the United States and were never intended to do so. In short, the products never moved and there was no delivery or intention to deliver. Storage, handling and transportation charges connected with the sale or resale were "for the account of the offerer" (processor), and the offerer assumed all risk of loss. The Government through CCC obtained no right to sell the goods to other parties but was obliged to resell them at a loss to the processor. On the other hand, the processor not only retained physical possession of the products but full power to disregard his contract to sell and repurchase and to dispose of or sell them to anyone he pleased without incurring any liability to the Government. CCC did not pay for the products which it purposed to buy and the processors did not pay for the products which they purported to buy back. Both transactions were settled by one check of the CCC for the loss incurred in the transaction, which it agreed in advance to assume.

In view of these established facts, the reference in paragraph 9 of Da-112, quoted above, to the delivery of butter and cheese and the transfer of title to the products, back and forth, had no actual significance. The transactions were correctly characterized in the testimony of the Chief of the Dairy Division of the Department of Agriculture before the Fountain Committee of Congress. He said that delivery and transfer of title under Da-112 was really just a paper transaction, which ended up with the Government owing the cheese manufacturer 2¾ cents a pound on all the cheese on which he had submitted claims; that instead of the Government buying the cheese from the manufacturer and the manufacturer then buying it back, what actually happened was that CCC sent the manufacturer a check for the 2¾ cents difference.

The Department of Agriculture has itself recognized that a sale and simultaneous repurchase of products at a loss does not involve a genuine purchase and sale. In a series of opinions by the Solicitor to the Secretary of the Department of Agriculture, which were supported by opinions of the Attorney General of the United States, it was pointed out that the Secretary was not authorized by the statute to support the price of dairy products by direct payments but only by loans and purchases, and it was specifically stated in the opinion by the Solicitor on October 15, 1954, that a purchase of commodities from a processor and the simultaneous sale back at a lower price "would constitute a mere device for the purpose of accomplishing by indirection what could not be accomplished directly."*

The defendants contend that these opinions have no bearing on the question before the court because they were not directed to the programs of price control promul-

* See the opinions of the Solicitor of the Department of Agriculture, May 7, 1954 and October 13, 1954; the opinions of the Attorney General, June 9, 1954 and December 29, 1954; and the letter of the Secretary to the Speaker of the House of Representatives, January 3, 1955, in which it was said that additional legislation would be needed to authorize a method of payment by the purchase-and-sale at a loss or a "wash sale" plan.

gated by the Secretary under the Act of 1949 but were spoken in condemnation of programs which would not accomplish the removal of surplus commodities from the market but allow them to find their own level in free competition. Even so, it is plain that the Department does not rest its actions on the reality of Da-112 transactions as purchases and sales, but on the ground that the Secretary has the power to follow any course which, in his opinion, will support prices at the desired level. In our judgment this position is untenable in view of the clear intent of Congress to confine the methods of the Secretary to purchases or loans.

There is no parallel between the facts of this case and those in *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, on which the defendants base their contention as to the extent of the Secretary's discretion. In that case the court accepted the conclusion of the Labor Board that newsboys continously and regularly engaged in selling papers are entitled to the protection of the National Labor Relations Act as "employees" of the publishers, who control the buying and selling prices, the markets, supplies and hours of labor, and furnish a substantial part of the equipment. The court held that, in reviewing the ultimate conclusions of the Board, it should not substitute its inference of fact for those of the Board if they are supported by substantial evidence and have a reasonable basis in the law. This decision is not persuasive here since Congress, after giving careful consideration to the matter, denied the Secretary broad discretion as to the methods of price support, and confined him to those specifically ennumerated in the Act.

Differences in opinion have arisen in this case as to the economic effect of Da-112 transactions. It is conceded that the program saved money not only for the processor but also for the Government, but it is insisted, for a number of reasons, that there is no reasonable ground for the view that they tended to support the market prices of the products for the benefit of the dairy industry. We do not enter into this controversy. We ground our opinion on the con-

clusion that it was well within the power of Congress to determine what methods should be employed to solve the economic problems arising in a difficult field and that the mandate of Congress must be obeyed.

The District judge denied interest prior to judgment on the sums received by the defendants on the ground that its allowance would be inequitable under all the circumstances of the case. The Government does not dispute the general rule that in suits for the enforcement of quasi contractual obligations arising from payments of money by mistake, interest is not allowed as a matter of right but depends upon considerations of practical justice and fairness. *Jackson County v. United States*, 308 U. S. 343, 350; *Royal Indemnity Co. v. United States* 313 U.S. 289, 296; *United States v. Bass*, 8 Cr., 215 F. 2d 9. The circumstances of the present controversy fully justify the application of the rule "which comports best with general notions of equity." The defendants entered into the transactions which gave rise to the present suits at the invitation of the United States, in the belief on both sides, that the payments were made in accordance with the governing statutes. Although it now appears that the payments were improperly made, it is conceded that one of the results of the transactions was the saving of a considerable outlay of money on the part of the United States. Furthermore, the department of the Government most concerned insisted for more than two years after the payments were made that the defendants were entitled to retain them, and apparently still holds this view notwithstanding the contrary opinion of the representatives of the Government who prosecute these suits. In view of these facts, it would be inequitable to add interest prior to the date when the judgments were rendered.

Affirmed.